

No. PD-0679-21

In the
Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
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No. 1533080

In the 179th District Court
Of Harris County, Texas

VITAL GARCIA

Appellant

V.

THE STATE OF TEXAS

Appellee

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT WAIVED

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Hon. Marc Brown
179th District Court
Harris County, Texas

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 68.4(d), the State waives oral argument.

STATEMENT OF THE CASE

Appellant was charged with the first-degree felony offense of aggravated assault of a family member resulting in serious bodily injury. (C.R. 8, 120-21). Following a jury trial, appellant was convicted of the charged offense. (C.R. 187-88). Appellant pleaded “true” to an enhancement allegation of a prior felony conviction for indecency with a child, and he was sentenced to thirty-five years of imprisonment at the Institutional Division of the Texas Department of Criminal Justice. (C.R. 187).

Appellant filed an appeal challenging the sufficiency of the evidence to show the complainant suffered serious bodily injury. The court of appeals issued a published opinion reversing the judgment of conviction and remanding the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of second-degree aggravated assault and to conduct a new hearing on punishment.

STATEMENT OF PROCEDURAL HISTORY

On August 10, 2021, a majority panel of the Fourteenth Court of Appeals issued a published opinion concluding that the evidence is insufficient to support the jury’s

finding that the complainant suffered serious bodily injury, but sufficient to establish the elements of aggravated assault. The majority opinion reversed the judgment of conviction and remanded the case to the trial court to reform the judgment to reflect a conviction for second-degree aggravated assault. *See Garcia v. State*, No. 14-19-00086-CR, 2021 WL 3576807 (Tex. App.—Houston [14th Dist.] 2021) (to be published). (Appendix A). A dissenting opinion was filed by Justice Poissant. (Appendix B).

The State’s petition for discretionary review is due October 11, 2021.

GROUND FOR REVIEW

Whether the Fourteenth Court of Appeals improperly acted as a “thirteenth juror” by re-evaluating the weight and credibility of the evidence showing that the complainant’s gunshot wounds constituted serious bodily injury?



REASONS FOR REVIEW

The State submits that this Court should grant discretionary review because the Fourteenth Court of Appeals failed to apply the appropriate standard of review for assessing the sufficiency of the evidence and improperly substituted its own judgment for that of the factfinder after re-evaluating the weight and credibility of the evidence.

ARGUMENT AND AUTHORITIES

In concluding that the evidence is insufficient to support the jury’s finding that the complainant suffered serious bodily injury, the panel majority improperly

reevaluated the weight and credibility of the evidence and substituted its own judgment over the judgment of the factfinder.

I. Background.

The evidence at trial established that the appellant came home early from work on May 25, 2016 to find his girlfriend, the complainant, smoking marijuana with another man. (III R.R. 23-24). The appellant immediately produced a .40-caliber handgun and shot the complainant through her right thigh. (III R.R. 27-28). The complainant attempted to escape, but the appellant cornered her in the kitchen and shot her a second time, at close range, through her right breast. (III R.R. 28, 33). Afterwards, the appellant fled outside. (III R.R. 35). The complainant testified that she was bleeding, and she attempted to clean off the blood before driving herself to the hospital:

I grabbed myself, put myself under some water first, under the sink water, throwing water on me. And finally I got my keys, got my wallet, got my phone, got in the car, and I was thinking that I was gonna make it to the hospital but I knew I wasn't.

(III R.R. 33-34). She explained that she did not call 911 because she was in shock. (III R.R. 35).

The complainant testified that she was unable to drive even a block before she had to stop and ask a security officer for help. (III R.R. 36). She was bleeding profusely, and she doubted she could make it to the hospital without assistance. (III R.R. 36, 85). When EMS arrived to transport the complainant to the hospital, she lost consciousness and could not remember anything after entering the ambulance. (III R.R. 39-40). The

complainant testified that she thought she was going to die. (III R.R. 40). Upon arrival at the hospital, she reported experiencing pain measuring as high as an eight out of ten on a scale of intensity. (VI R.R. SX 47 at p. 117).

The complainant's gunshot wounds were treated at the hospital by Dr. Jordan Smith. Medical records reflect that the complainant sustained multiple "deep" lacerations to her right thigh and breast. (VI R.R. SX 47 at p. 146). A laceration to the superior right breast measured one-and-a-half centimeters in length, a laceration to the lower right breast measured three centimeters in length, a laceration to the right anterior thigh measured four centimeters in length, and a laceration to the right lateral thigh measured two centimeters in length. *Id.* at pp. 121, 146. The complainant's bleeding was controlled at the emergency room through the application of direct pressure. *Id.* at p. 121. The gunshots did not strike any of the complainant's vital organs, and she was treated and released from the hospital the same day, but twelve staples were required to close the wounds. (IV R.R. 38, 41-42; VI R.R. SX 47 at pp. 121-22, 146). Dr. Smith testified that staples commonly leave scars, and the complainant confirmed at trial that she still bears scars on her breast and thigh. (III R.R. 40; IV R.R. 44).

Dr. Smith also testified that a gunshot wound can cause serious bodily injury or death, and opined that the complainant's wounds constituted serious bodily injury. (IV R.R. 39). He noted that the gunshot wounds were located in close proximity to the complainant's vital organs, including the blood vessels underneath the ribs and thorax, the lungs, the heart, the femur, and the femoral artery. (IV R.R. 39-40).

The complainant was released from the hospital after several hours with instructions to return in ten days to have the staples removed. (IV R.R. 42; VI R.R. SX 47 at pp. 146-47). A 1.6 centimeter bullet remained embedded in the complainant's right upper thigh along with scattered bullet fragments. (VI R.R. SX 47 at pp. 145-46).

II. *The majority panel improperly acted as a "thirteenth juror" by re-evaluating the weight and credibility of the evidence showing the complainant suffered serious bodily injury.*

The majority opinion finds that the State failed to present evidence demonstrating that the appellant caused the complainant to suffer serious bodily injury. "Serious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." TEX. PENAL CODE ANN. § 1.07(a)(46). Whether an injury qualifies as "serious bodily injury" is determined on a case-by-case basis. *Eustis v. State*, 191 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Gunshot wounds do not constitute serious bodily injury per se. *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim. App. 1985). The relevant inquiry is "the disfiguring and impairing quality of the bodily injury as it was inflicted." *Blea v. State*, 483 S.W.3d 29, 34-35 (Tex. Crim. App. 2016). Serious bodily injury may be established without a physician's testimony when the injury and its effects are obvious. *Id.* at 35.

When reviewing the sufficiency of the evidence, the court views the evidence in the light most favorable to the verdict to determine whether any rational trier of fact

could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). As the factfinder, the “jury is the sole judge of credibility and weight to be attached to the testimony of witnesses.” *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). The factfinder is “free to apply common sense, knowledge, and experience gained in the ordinary affairs of life in drawing reasonable inferences from the evidence.” *Eustis*, 191 S.W.3d at 884.

When the record supports conflicting inferences, the reviewing court should presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. *Dobbs*, 434 S.W.3d at 170. Conflicts in the evidence do not warrant reversal if there is enough credible testimony to support the conviction. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). The reviewing court should not become a “thirteenth juror” by disregarding or re-evaluating the weight and credibility of the evidence. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

In finding the evidence insufficient to show that the gunshot wounds to the complainant caused serious bodily injury, the panel majority re-evaluates the weight and credibility of the evidence and improperly substitutes its own judgment for that of the factfinder. Although the panel majority acknowledges that being shot twice with a .40 caliber handgun was “undoubtedly a traumatic experience” for the complainant, it concludes there was no evidence of serious bodily injury because the “shots did not

knock appellant [sic] down, and she was immediately able to gather her things, walk to her car, and drive away.” *Garcia*, 2021 WL 3576807, at *3.¹

The majority panel should have viewed the evidence in the light most favorable to the verdict and inquired whether a rational trier of fact could have found beyond a reasonable doubt that the complainant suffered serious bodily injury. A rational factfinder could have reasonably inferred that the complainant attempted to drive herself to the hospital, not because her injuries were trivial, but because she was in a state of shock. As the exclusive judge of the credibility of witnesses, the jury could also have believed the complainant’s testimony that she initially thought she could make it to the hospital on her own, but quickly realized she needed assistance due to the seriousness of her injuries.

The evidence also showed that the complainant bled profusely at the scene, that she continued to bleed in her car and during the transport via ambulance, and that the bleeding was eventually controlled at the hospital. (III R.R. 85; VI R.R. SX 7, 8, 9, 46 at p. 55, and SX 47 at pp. 146, 166). The majority opinion discounts this evidence because the record does not reflect the amount of blood lost. *See id.* However, the jury could have rationally concluded that the complainant lost a substantial amount of blood in light of evidence that she sustained multiple “deep” lacerations, and that she lost

¹ The record does not reflect precisely how long the complainant remained at the crime scene before attempting to drive herself to the hospital. The complainant testified that she tried to wash off the blood before “finally” grabbing her keys and departing for the hospital. (III R.R. 33-34).

consciousness shortly after the shooting. (III R.R. 40; VI R.R. SX 46 at p. 146). The photographs of the crime scene also show a considerable amount of blood on the walls and floor of the complainant's apartment. *See* (VI R.R. SX 7, 8, 9).

The majority opinion rejects the complainant's testimony that she "went out" after entering the ambulance because her testimony was contradicted by EMS records. *See Garcia*, 2021 WL 3576807, at *3. An event report created by the Houston Fire Department described the complainant as a "female shot in stomach" who was "conscience [sic] and alert" at the location. (VI R.R. SX 46 at pp. 58, 61). A separate EMS report indicates that the complainant was rapidly assessed at the scene for multiple gunshot wounds, she was transported as a "priority 2" to the hospital for further evaluation, and her condition remained unchanged during transport. *Id.* at p. 52. A rational jury could have found that these reports did not preclude the possibility that the complainant lost consciousness at some point after being loaded into the ambulance. By choosing to discredit the complainant's testimony, the majority opinion erroneously disregards well-established precedent that it falls within the exclusive province of the jury to judge the credibility of the witnesses and to resolve conflicting inferences. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). Rather than re-evaluating the credibility of the evidence, the reviewing court should have instead considered whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

The panel majority also improperly re-evaluates the credibility of the complainant's testimony that she believed she was going to die from her injuries. A victim is qualified to offer an opinion regarding the seriousness of her wounds. *See Hart v. State*, 581 S.W.2d 675, 677 (Tex. Crim. App. 1979); *Kerby v. State*, No. 14-10-00416-CR, 2011 WL 3667844, at *5-6 (Tex. App.—Houston [14th Dist.] Aug. 23, 2011, pet. ref'd) (not designated for publication). Here, the majority opinion discredits the complainant's testimony that she thought she was going to die because the complainant did not clarify whether she was expressing a generalized fear of death or giving an assessment of her injuries. *Garcia*, 2021 WL 3576807, at *3. However, the complainant's opinion was offered during a line of inquiry regarding the extent of her injuries.² Given the context of the complainant's testimony, the jury could have logically inferred that she believed she was going to die as a result of the severity of her gunshot wounds.

Finally, the majority rejects the expert testimony of the complainant's treating physician that the gunshot wounds constituted serious bodily injury because the physician was not specifically questioned about the statutory criteria for serious bodily injury. *See id.* at *4. The testimony of a treating physician may suffice to establish that the victim suffered serious bodily injury. *See Pruneda v. State*, 168 Tex. Crim. 510, 329 S.W.2d 886, 887 (1959) (holding that doctor's testimony that lacerations to the victim's

² The prosecutor questioned the complainant about the effects of the gunshots to her body, whether she had surgery, how long she remained at the hospital, whether her wounds were sutured, whether she bears scars from her injuries, and whether she thought she was going to die. *See* (III R.R. 39-40).

head were serious bodily injury was sufficient to show that serious bodily injury was inflicted). The preferred method for establishing serious bodily injury is through the testimony of a physician, but expert testimony is unnecessary where the injury and its effects are obvious. *Carter v. State*, 678 S.W.2d 155, 157 (Tex. App.—Beaumont 1984, no pet.).

Here, the treating physician testified that the complainant's wounds constituted serious bodily injury because they were located in close proximity to her vital organs. (IV R.R. 39-40). He explained that the complainant could have died if the bullets struck her vital organs or any of the major arteries or veins located close to the area of the gunshot wounds. (IV R.R. 39-40). Considering Dr. Smith's testimony regarding the significant risk of death created by the gunshot wounds, the jury could have reasonably determined that the complainant sustained serious bodily injury.

The dissenting opinion correctly applies a deferential standard of review, and observes that a rational jury could have concluded that the complainant's wounds constituted serious bodily injury in light of evidence that:

- (1) the Complainant suffered four wide and deep wounds from two bullets that passed through her breast and her thigh;
- (2) the Complainant was bleeding, in shock, thought she was going to die, and had "gone out" before arriving at the hospital;
- (3) Dr. Smith, an emergency room physician specialist, had to close the wounds with twelve staples that could not be removed for ten days;

- (4) Dr. Smith, a specialist in emergency medicine, testified based upon the location of the gunshot wound, he considered the wound as “serious bodily injury”; and
- (5) Dr. Smith had seen multiple deaths occur from gunshots in the chest area and that the location of either gunshot wound could have caused the Complainant’s death.

Garcia, 2021 WL 3576807, at *7 (Poissant, J., dissenting).

Viewing the aforementioned evidence in the light most favorable to the verdict, any rational trier of fact could have found beyond a reasonable doubt that the gunshot wounds suffered by the complainant constituted serious bodily injury.

◆

PRAYER FOR RELIEF

The State prays that this Court will grant the State’s ground for discretionary review, find that the court of appeals applied the incorrect standard of review for assessing the sufficiency of the evidence, and reverse the judgment of the court of appeals.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretion review contains 2,700 words, as represented by the word-processing program used to create the document. This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in a 12-point typeface.

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CERTIFICATE OF SERVICE

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No. PD-0679-21

In the
Court of Criminal Appeals of Texas
At Austin

VITAL GARCIA
Appellant
V.
THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 14-19-00086-CR
In the Fourteenth Court of Appeals

Trial Court Cause No. 1533080
179th District Court of Harris County, Texas
Hon. Marc Brown, Presiding

APPENDIX

Majority Opinion	Appendix A
Dissenting Opinion	Appendix B

Appendix A



Majority Opinion

Reversed and Remanded and Majority and Dissenting Opinions filed August 10, 2021.



**In The
Fourteenth Court of Appeals**

NO. 14-19-00086-CR

VITAL GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1533080**

MAJORITY OPINION

Appellant Vital Garcia appeals his conviction for first degree aggravated assault on a family member resulting in serious bodily injury. A jury convicted appellant, and after he pleaded true to an enhancement allegation, the trial court assessed his punishment at 35 years in prison. In two issues, appellant contends that (1) the evidence was insufficient to establish that the complainant suffered serious bodily injury or that she was appellant's family member, and (2) the trial

court erred in refusing to submit a jury instruction on the lesser included offense of second degree aggravated assault. Concluding that the evidence was insufficient to support the jury's finding that complainant suffered serious bodily injury, we reverse the trial court's judgment and remand the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of second degree aggravated assault and to conduct a new hearing on punishment.

Background

The complainant testified that she was in a dating relationship with appellant. She was 19 when they met, and appellant was "way older." She said that they were together "[n]o more than a year" and although the relationship was "somewhat" good at the beginning, "it wasn't such a great relationship." They lived in two consecutive apartments together, and when they moved to the second apartment, appellant became physically and verbally abusive.

Complainant said that appellant carried a .40 caliber gun with him "24/7" and threatened that if she cheated on him, he would kill her. On May 25, 2016, appellant left for work and complainant was alone in the apartment. She decided to call "Myrick" and ask him to come to the apartment. She described Myrick as her "weed guy" but acknowledged that they had once dated. Appellant came home from work early that day, while complainant and Myrick were smoking marijuana in the apartment. When appellant entered the apartment, he went straight to the bathroom, and complainant heard a gun being cocked. When appellant exited the bathroom, complainant tried to "get away" and moved toward the kitchen, but appellant shot her through her right thigh. Complainant remained standing after being shot. Appellant then fired shots at Myrick, who threw himself out of the balcony window. Appellant trapped complainant in the kitchen and shot her through her right breast.

Complainant grabbed her keys, phone, and wallet and went to her car, thinking that she could make it to the hospital. She said she did not call 911 because she was in shock. Appellant had also left the apartment, and complainant could hear more gunshots outside. Complainant drove about a block away when she saw police officers and asked them for help. She was bleeding and no longer thought she would make it to the hospital. She said that after she got into the ambulance, she “went out” and did not remember anything after that until she got to the hospital. She did not have to have surgery but said she still had scars on both her breast and her leg. After being shot, she thought she was going to die.

A security guard working for the apartment complex testified that on that day, he saw appellant enter his apartment and then heard multiple gunshots and a woman scream. Appellant then ran down the staircase. The guard chased appellant but eventually lost sight of him. Appellant later returned to the apartment complex during the investigation, was arrested, and showed officers where he had thrown his gun near a fence. One officer testified that Myrick had to be carried from the scene by EMS, and he was bleeding “from multiple areas on his body.” Appellant told officers that he thought the people he shot were trying to steal his property. One of the officers testified, however, that the apartment looked “pretty bare,” there was no sign of forced entry, and he could not tell if someone had tried to take any property.

Dr. Jordan Smith testified that he is the emergency physician who treated complainant when she arrived at the hospital. She suffered two gunshot wounds—one bullet passed through her right breast and the other went through her right thigh. Smith performed a thorough examination of complainant, including using ultrasound and radiology imaging to make sure that she did not have any damage to major organs, a collapsed lung, or rib or femur fractures. He also washed the

wounds and closed them with staples. He stated that there were four wounds that had to be closed.

Smith also testified that a gunshot wound can cause serious bodily injury and even death, and based on the location of complainant's wounds, he believes she sustained serious bodily injury. He described several vital organs in the area of the wounds that if hit, could have led to complainant's death. On cross-examination, Smith acknowledged that none of complainant's vital organs appeared to have been hit by the bullets and that she was only at the hospital for less than three and a half hours before being discharged. On re-direct, Smith said that complainant was instructed to have the staples removed in ten days and that the procedure typically leaves scarring. Smith was not asked about and did not discuss whether complainant's injuries, if left untreated, could have created a substantial risk of death or caused death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Photographs taken of the crime scene and introduced into evidence showed signs of blood in the apartment, but it is impossible to tell from the photographs how much blood complainant lost. An EMS report admitted into evidence states that complainant was alert and conscious at the scene and her condition did not change during transport.

Complainant's medical records, which were also admitted as evidence, showed that she was shot at close range with a handgun. Although the records show that appellant was in pain, they reveal no other form of distress. The laceration on the top of her right breast was 1.5 centimeters long and the laceration on the bottom of her breast was 3 centimeters long. The laceration on the top of her right leg was 4 centimeters, and the laceration on the side of the leg was 2 centimeters. The lacerations were described as "simple" and "deep," and fragments

of the bullet that entered her leg remained in the leg after treatment. Upon her release after less than three and a half hours, complainant was said to be stable and without complications. Appellant did not present any witnesses and did not testify himself.

Sufficiency of the Evidence

Governing Law. In his first argument under his first issue, appellant contends that the evidence was insufficient to prove that complainant suffered serious bodily injury as a result of appellant shooting her. In assessing the sufficiency of the evidence to support a conviction, we must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational trier of fact could have found the challenged element or elements of the crime beyond a reasonable doubt. *See Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *see also Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). In reviewing historical facts that support conflicting inferences, we presume that the jury resolved any conflicts in the State’s favor and defer to that resolution. *Whatley*, 445 S.W.3d at 166. We do not sit as a thirteenth juror and may not substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). As judge of the credibility of the witnesses, a jury may choose to believe all, some, or none of the testimony presented. *Cain v. State*, 958 S.W.2d 404, 407 n.5 (Tex. Crim. App. 1997).

The elements of the offense of first-degree aggravated assault on a family member require evidence that the actor used a deadly weapon during the commission of an assault and caused serious bodily injury. *See* Tex. Penal Code § 22.02(b)(1); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). The Penal Code defines “bodily injury” as “physical pain, illness, or any impairment of

physical condition” and “serious bodily injury” as “bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Tex. Penal Code § 1.07(a)(8), (46). Whether an injury constitutes serious bodily injury is determined on a case-by-case basis. *Miller v. State*, 312 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *Moore v. State*, 739 S.W.2d 347, 349 (Tex. Crim. App. 1987)). The relevant inquiry is the degree of risk posed and the disfiguring and impairing quality of the injury as inflicted, not after the effects have been ameliorated or exacerbated by medical treatment. *See Blea*, 483 S.W.3d at 34-35. Serious bodily injury may be established without a physician’s testimony when the injury and its effects are obvious. *Id.* at 35.

Analysis. Here, the State failed to present evidence demonstrating that appellant caused complainant to suffer “serious bodily injury,” i.e., that the injuries she sustained created “a substantial risk of death” or caused “death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Tex. Penal Code § 1.07(a)(46).

The evidence established that appellant shot complainant twice with a .40 caliber handgun. This was undoubtedly a traumatic experience for complainant and one that caused her bodily injury; however, a gunshot wound is not per se serious bodily injury. *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim. App. 1985). The State was required to present specific evidence regarding the nature of the injuries inflicted. *See id.* (“The shooting of an individual is a serious and grave matter. Yet, it is the burden of the State to prove that such an act created a substantial risk of death, or caused death, a serious permanent disfigurement, or protracted loss or impairment of the functions of any bodily member or organ.”).

Evidence showed that the two bullets passed through complainant’s right

thigh and right breast, but there was no evidence that they hit any vital organs or caused any serious or lasting impairment or disfigurement. The shots did not knock appellant down, and she was immediately able to gather her things, walk to her car, and drive away. Complainant drove for about a block before happening upon police officers. She said that at first, she thought she could make it to the hospital on her own but then changed her mind. She was bleeding but there is little evidence to indicate how much blood she lost. There is no indication in the medical records that she received a blood transfusion. Complainant stated that she thought she was in shock and that she “went out” once she got into the ambulance, but the EMS records reflect that she was alert and conscious at the scene and her condition did not change during transport. Complainant further said that at one point, she thought she was going to die. *See generally Hart v. State*, 581 S.W.2d 675, 677 (Tex. Crim. App. 1979) (panel op.) (explaining that a complainant is qualified to express an opinion regarding the seriousness of her injuries). But she was not asked to and did not explain the basis for that feeling, whether it was just a fear or whether it was an assessment of her physical condition.

Complainant also mentioned that she had scars from the wounds, but she did not describe the scars and the scars were not shown to the jury either in person or in photographs. The simple fact that some scarring occurred is not alone sufficient to support a finding of serious bodily injury. *See, e.g., Sizemore v. State*, 387 S.W.3d 824, 828 (Tex. App.—Amarillo 2012, pet. ref’d); *see also Wade v. State*, 594 S.W.3d 804, 811 (Tex. App.—Austin 2020, pet. granted) (“Rather, ‘[t]here must be evidence of some significant cosmetic deformity caused by the injury.’”) (quoting *Hernandez v. State*, 946 S.W.2d 108, 113 (Tex. App.—El Paso 1997, no pet.)). Complainant did not mention any loss or impairment of the function of any bodily member or organ.

Smith, complainant's treating physician, stated that he thought her wounds constituted serious bodily injury, but he was not asked about and expressed no opinion regarding the statutory criteria for serious bodily injury. Smith was asked about and discussed the fact that the bullet wounds were close to several vital organs, and he opined that had those organs been hit, complainant could have died. But there was no evidence that any of complainant's vital organs were hit or otherwise impacted by the bullets. Indeed, Smith performed tests and was satisfied that no vital organs were impacted. Smith was not asked and did not indicate what would or could have happened with complainant's wounds had she not received medical care.

The treatment complainant received at the hospital was relatively brief and nonintrusive. Medical records showed that she was at the hospital for three hours and twenty minutes. Smith described her wounds as "simple" and "deep," and he cleaned them and closed them with twelve staples. Although fragments of the bullet that entered complainant's leg remained in the leg after treatment, there was no evidence that this condition would or could cause any complications. Complainant was released from the hospital with a prescription for pain medication and instructions to have the staples removed in ten days. There was no evidence of any restrictions placed on complainant due to her wounds, much less the loss of any use or function of any bodily member or organ. Complainant was recorded as being "ambulatory" at the scene and when she left the hospital.

In short, there was insufficient evidence to support the jury's finding that complainant's injuries created "a substantial risk of death" or caused "death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code § 1.07(a)(46); *see also Williams*, 696 S.W.2d at 897-98 (holding evidence was insufficient to prove bullet wound

constituted serious bodily injury where no testimony was offered suggesting the complainant suffered either a substantial risk of death or a serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ); *Black v. State*, 637 S.W.2d 923, 926 (Tex. Crim. App. 1982) (holding evidence was insufficient to prove bullet wound caused serious bodily injury where although complainant was in the hospital for three days and took two to three months to heal, there was no evidence of the severity of the wound or any permanent damage); *Hollaway v. State*, 446 S.W.3d 847, 852 (Tex. App.—Texarkana 2014, no pet.) (holding evidence was insufficient to support finding that abdominal stab wound was serious bodily injury where the complainant was not shown to have suffered either internal injuries or complications even though paramedic testified that the injury was a very serious type of injury).

Accordingly, the evidence was insufficient to support appellant's conviction for aggravated assault on a family member resulting in serious bodily injury. We therefore sustain appellant's first issue.

Disposition

Having determined that the evidence was legally insufficient to support appellant's conviction for first degree aggravated assault on a family member resulting in serious bodily injury under Texas Penal Code section 22.02(b)(1), we must now consider whether the conviction should be reformed to convict appellant of the lesser-included offense of second degree aggravated assault under section 22.02(a)(2). *See Canida v. State*, 434 S.W.3d 163, 166 (Tex. Crim. App. 2014).

When an appellate court determines the evidence is insufficient to support a conviction for a greater-inclusive offense, the court must consider the following two questions when deciding whether to reform the judgment to reflect a conviction for a lesser-included offense: (1) in the course of convicting the

appellant of the greater offense, did the jury find every element necessary to convict the appellant for the lesser-included offense? and (2) does the evidence support a conviction for the lesser-included offense? *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014). If the answer to both questions is yes, the court is required to reform the judgment to reflect a conviction for the lesser-included offense. *Id.* at 300.

As relevant to this case, a person commits the offense of aggravated assault if the person commits assault causing bodily injury and uses or exhibits a deadly weapon during the commission of the assault. *See* Tex. Penal Code § 22.02(a)(2). The offense is generally punishable as a second-degree felony. *Id.* § 22.02(b). The parties agree that, under the circumstances of this case, aggravated assault is a lesser included offense of aggravated assault on a family member resulting in serious bodily injury. The two offenses required proof of the same elements with the greater offense additionally requiring proof of serious bodily injury and that the complainant was a family member, i.e., in this case, in a dating relationship with the accused. *Compare id.* § 22.02(a)(2), *with id.* § 22.02(b)(1).

In his briefing, appellant only challenges the sufficiency of the evidence as to the elements of serious bodily injury and that complainant was a family member of appellant. Appellant does not contest that the evidence demonstrated he assaulted complainant causing bodily injury and used a deadly weapon during the commission of the assault. *See id.* § 22.02(a)(2). Indeed, as discussed above, the evidence showed appellant shot complainant twice, with the bullets passing through her thigh and breast. A firearm is a deadly weapon per se. *See id.* § 1.07(a)(17)(A) (defining “deadly weapon” as “a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury”). Accordingly, we conclude that the evidence and the jury’s findings are

sufficient to support a conviction under the lesser-included offense of second-degree aggravated assault.¹

Conclusion

Because we conclude that the evidence was insufficient to support the jury's finding that complainant suffered serious bodily injury but sufficient to support a finding on the elements of aggravated assault, we reverse the trial court's judgment and remand the case to the trial court with instructions to reform the judgment to reflect a conviction for the offense of second degree aggravated assault and to conduct a new hearing on punishment.

/s/ Frances Bourliot
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant. (Poissant, J., dissenting).

Publish — TEX. R. APP. P. 47.2(b).

¹ Because of our resolution of appellant's first argument under his first issue, we need not address appellant's second argument under his first issue—asserting the evidence was insufficient to support the finding that complainant was a family member of appellant— or his second issue—asserting appellant was entitled to a jury instruction on the lesser included offense of second degree aggravated assault. Specifically, concerning the second issue, since we are required under *Thornton* to order the judgment reformed to reflect a conviction for aggravated assault, there would be no point in determining whether appellant was entitled to a jury instruction on aggravated assault as a lesser-included offense of aggravated assault on a family member resulting in serious bodily injury. 425 S.W.3d at 300.

Appendix B



Dissenting Opinion

Reversed and Remanded and Majority and Dissenting Opinions filed August 10, 2021.



**In The
Fourteenth Court of Appeals**

NO. 14-19-00086-CR

VITAL GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 1533080**

DISSENTING OPINION

The elements of the offense of first-degree aggravated assault of a family member require evidence that the actor used a deadly weapon during the commission of an assault and caused serious bodily injury. *See* Tex. Penal Code Ann. § 22.02(b)(1); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016).

The Penal Code defines “bodily injury” as “physical pain, illness, or any impairment of physical condition” and “serious bodily injury” as “bodily injury

that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” Tex. Penal Code Ann. § 1.07(a)(8), (46). Whether an injury constitutes serious bodily injury is determined on a case-by-case basis. *Miller v. State*, 312 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *Moore v. State*, 739 S.W.2d 347, 349 (Tex. Crim. App. 1987), *overruled on other grounds by Blea v. State*, 483 S.W.3d 29, 34 (Tex. Crim. App. 2016)). A gunshot wound is not per se serious bodily injury. *Williams v. State*, 696 S.W.2d 896, 898 (Tex. Crim. App. 1985). The relevant inquiry is the degree of risk posed and the disfiguring and impairing quality of the injury as inflicted. *See Blea*, 483 S.W.3d at 34–35. Serious bodily injury may be established without a physician’s testimony when the injury and its effects are obvious. *Id.* at 35.

Complainant suffered two gunshot wounds near vital organs, bled profusely, lost consciousness, required emergency room treatment, has bullet fragments in her right thigh, and has scars from the bullet wounds. The testimony of the emergency room physician who treated Complainant established both that the Complainant suffered serious bodily injury and that her injuries could have caused Complainant’s death.

The jury is free to apply its common sense, knowledge, and experience to draw reasonable inferences from the facts presented. *Eustis v. State*, 191 S.W. 3d 879, 884 (Tex. App.—Houston [14th Dist.] 2006, pet. ref’d); *see also Montgomery v. State*, No. 14-16-00365-CR, 2017 WL 2484375, at *3 (Tex. App.—Houston [14th Dist.] June 8, 2017, pet. ref’d) (mem. op., not designated for publication).

Here, the evidence demonstrated that appellant shot Complainant twice with a .40 caliber handgun—in her right thigh and right breast. After she was shot, Complainant was bleeding and made it to her vehicle, but was unable to drive even

a block away. She testified she did not think she would make it to the hospital, and thought she was going to die. After obtaining assistance from a security guard, Complainant was taken by ambulance to the emergency room. She said that after she got into the ambulance, she “went out” and remembered nothing after that until she got to the hospital.

Complainant’s loss of blood was confirmed by photographs from the scene showing blood on the floor, a wall, a pillow, and a towel, as well as the EMS report that showed the bleeding was controlled by the EMS crew. Complainant did not have surgery but testified at trial that she still had scars on her breast and her leg.

Jordan Smith, M.D., testified that he was the emergency physician who treated Complainant, and was, at the time of her treatment, a specialist in emergency medicine. According to Dr. Smith, Complainant suffered two gunshot wounds—one through her right breast and the other through her right thigh “with a retained bullet.” He reported that there were four wounds, two entrance and two exit wounds, that had to be stapled closed.

Dr. Smith testified that a gunshot wound can cause serious bodily injury and death, and based on the location of Complainant’s wounds, he opined she sustained serious bodily injury:

Q: Based on the location of [Complainant’s] gunshot wound, would you consider that serious bodily injury?

A: Yes, I would.

Dr. Smith described the vital organs that are close to the gunshot wound to Complainant’s breast, including the vessels underneath the ribs and thorax, the heart, and lungs. He stated his primary concerns included: the bullet hitting her lung and causing a collapsed lung, bleeding in the thorax, and the bullet hitting her

heart or a major artery, which could have caused her death. Dr. Smith testified he had seen multiple deaths occur from gunshots in the chest area. He testified the gunshot to Complainant's thigh was close to her femur bone, major arteries and veins, the femoral artery, femoral vein, and nerves, that, if hit, could have caused her death.

Photographs taken of the crime scene and introduced into evidence showed blood on the wall and floor of the apartment, as well as on a pillow and what looks like a towel. Complainant's medical records, which were also admitted as evidence, showed that she was shot at close range with a handgun and was experiencing pain. The wounds were closed by twelve staples that could not be removed for ten days. The lacerations were described as "deep," and fragments of the bullet that entered her leg remained in her leg after treatment.

Complainant testified that she had scars from the wounds, and Dr. Smith confirmed that such wounds commonly lead to scarring.

Under our highly deferential standard of review, the following evidence was before the jury:

- (1) the Complainant suffered four wide and deep wounds from two bullets that passed through her breast and her thigh;
- (2) the Complainant was bleeding, in shock, thought she was going to die, and had "gone out" before arriving at the hospital;
- (3) Dr. Smith, an emergency room physician specialist, had to close the wounds with twelve staples that could not be removed for ten days;
- (4) Dr. Smith, a specialist in emergency medicine, testified based upon the location of the gunshot wound, he considered the wound as "serious bodily injury"; and

(5) Dr. Smith had seen multiple deaths occur from gunshots in the chest area and that the location of either gunshot wound could have caused the Complainant's death.

This is sufficient evidence on which a rational trier of fact could have found that the assault caused serious bodily injury, and that Complainant was exposed to a substantial risk of death. *See Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014); *Hart v. State*, 581 S.W.2d 675, 677 (Tex. Crim. App. [panel op.] 1979) (stating that a complainant is qualified to express an opinion regarding the seriousness of her injuries); *Pruneda v. State*, 329 S.W.2d 886, 887 (Tex. Crim. App. 1959) (holding doctor's testimony that lacerations to complainant's head were serious injury was sufficient to show serious bodily injury); *see also Kerby v. State*, No. 14-10-00416-CR, 2011 WL 3667844, at *5 (Tex. App.—Houston [14th Dist.] Aug. 23, 2011, pet. ref'd) (mem. op., not designated for publication) (noting complainant's testimony stating he thought he was going to die in support of the conclusion that there was sufficient evidence supporting a finding of serious bodily injury); *Dupee v. State*, No. 05-91-01566-CR, 1994 WL 60604, at *6 (Tex. App.—Dallas Feb. 23, 1994, pet. ref'd) (not designated for publication) (same).

As judge of the credibility of the witnesses, a jury may choose to believe all, some, or none of the testimony presented. *See Cain v. State*, 958 S.W.2d 404, 407 & n.5 (Tex. Crim. App. 1997). Based on the evidence and reasonable inferences drawn from the evidence, the jury could have found the challenged element of the crime beyond a reasonable doubt. *See Whatley*, 445 S.W.3d at 166; *see also Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). Our function is not to sit as a thirteenth juror and substitute our judgment for that of the factfinder by reevaluating the weight and credibility of the evidence, *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010), and we should decline to do so here.

I respectfully dissent because the majority errs in concluding the evidence is insufficient to support the jury finding that Complainant suffered serious bodily injury, reversing appellant's conviction for first degree aggravated assault of a family member. Because there was evidence to support the jury finding of serious bodily injury caused by the assault, appellant's issues should be overruled and his conviction for first degree aggravated assault of a family member affirmed.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant. (Bourliot, J. majority).

Publish — TEX. R. APP. P. 47.2(b).

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